COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2013-SC-000423-MR

GREGORY WILSON — APPELLANT

v.

Appeal from Kenton Circuit Court
Action No. 87-CR-00166
Hon. Gregory M. Bartlett, Judge

COMMONWEALTH OF KENTUCKY — APPELLEE

REPLY BRIEF FOR APPELLANT, GREGORY WILSON

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Certificate of Service

This is to certify that a copy of this brief was mailed, first class postage prepaid, to Hon. Gregory M. Bartlett, Judge, Kenton Circuit Court, First Division, Kenton County Judicial Center, 230 Madison Avenue, Covington, KY 41011, Hon. Heather M. Fryman, Assistant Attorney General, Office of the Attorney General, Office of Criminal Appeals, 1024 Capital Center Drive, Frankfort, KY 40601, and Hon. Robert Sanders, Commonwealth's Attorney, 303 Court Street, Suite 605, Covington, KY 41011, on July 28, 2014. I further certify that the record on appeal was not removed from the office of the Clerk of the Supreme Court of Kentucky.

BRUCE P. HACKETT

PURPOSE OF THE BRIEF

This brief is filed in order to address the arguments made by the Commonwealth in its brief (Commonwealth's Brief), particularly those relating to the "reasonable probability" standard found in KRS 422.285. This reply brief will also refute the Commonwealth's assertion that the doctrines of "law of the case," "issue preclusion", and "*res judicata*" prevent this Court from granting relief. In fact, if the Commonwealth is correct and those doctrines are applied to Mr. Wilson's case, this Court would be required to order DNA testing of the hairs recovered from the victim's vehicle. This brief will also explain the significance of the incorrect insistence by the Attorney General for a period of twelve years, finally ending in February 2013, that the hairs collected in evidence in 1987 had been lost or destroyed and that the hairs "are known not to exist." (Commonwealth's Response to Motion for DNA Testing, p. 1; TR 87; Box 7 of 8).

TABLE OF POINTS AND AUTHORITIES

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ARGUMENT

I. Mr. Wilson was entitled to DNA Testing under KRS 422.285 and the United States and Kentucky Constitutions.

On page 14 of the Commonwealth's Brief, the Commonwealth argues that the doctrines of "*res judicata*", "law of the case" and "issue preclusion" all operate to forbid this Court from ordering DNA testing because Mr. Wilson requested testing of biological materials in his habeas action in federal court, the federal court ordered testing of a letter opener found in Brenda Humphrey's apartment[1] (which rendered negative results), and the federal court ultimately denied habeas relief. (Commonwealth's Brief, p. 14). The Commonwealth says that to order DNA testing now would be "a repetitious procedure" that is forbidden by KRS 422.285. (Commonwealth's Brief, pp. 14-15). KRS 422.285 does impose as a condition of post-conviction DNA testing that "[t]he evidence was not previously subjected to DNA testing and analysis." But in Mr. Wilson's case, that restriction would apply, if at all, only to the letter opener, the only item of evidence ever subjected to DNA testing. None of the biological materials collected by the state and federal investigators and stored by the Covington Police Department and the Kentucky State Police were ever subjected to DNA testing and analysis.

The Commonwealth's argument that the doctrines of "*res judicata*", "law of the case" and "issue preclusion" should apply to this Court would actually require this Court to order DNA testing of the hairs. After all, as the Commonwealth points out, the federal

[1] The Commonwealth mistakenly says the letter opener with possible blood was found in Ms. Pooley's apartment. (Commonwealth's Brief, p. 14). The item was actually found during a search of Brenda Humphrey's apartment by "Lt. Schawe, Spec. Tom Robinson, Officer Tucker and FBI." It was described as a "letter opener with possible blood stains." (Investigative Report, attached to "Motion to Order Letter Opener in Property Room of Covington Police Department to be Tested for Blood" filed in federal court by Gregory Wilson). (Box 6 of 8). The significance of the item was that although the jury never heard about it, Brenda Humphrey had confessed to her sister, Lisa Mains, that she (Brenda) had killed the victim by cutting her throat. *Id.*

court ordered DNA testing of the hairs.[2] (Commonwealth's Brief, p. 14). The only reason that the hairs were not tested is that the Commonwealth claimed in 2001 that they were no longer in existence.[3] Now that we know that the Commonwealth always had possession of the hairs and that the Commonwealth continues to possess them, under the Commonwealth's theory of "*res judicata*", "law of the case" and "issue preclusion," the federal court ruling that DNA testing was mandated by principles of due process of law

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[2] In the order entered on October 2, 2001, the United States District Court for the Eastern District of Kentucky at Covington granted Mr. Wilson's motion for DNA testing of the hairs that were identified at trial as having characteristics matching Mr. Wilson's hair, to wit: "Petitioner's motion for an order for DNA testing of hairs recovered from Deborah Pooley's car (doc. # 74-1) be, and it is hereby, granted as to hairs to which hair comparison testimony at petititoner's trial indicated the hairs were similar or had the same characteristics of petitioner." *Gregory Wilson v. Phil Parker, Warden*, No. 99-78. (See Box 6 of 8; "Record of 99-CV-78, Gregory Wilson v. Phil Parker, Warden").

[3] Referring to the federal court proceedings, the Commonwealth says, "Wilson also requested and received an inventory of **all evidence that remained in existence**." (Commonwealth's Brief, p. 14)(Emphasis added). That statement is simply untrue. At the time of the 2001federal court inventory, the hairs "remained in existence" but they were not included in the inventory. The hairs never went out of existence prior to 2001 and then came back into existence in 2013. In its May 13, 2010 response to the DNA motion in Kenton Circuit Court, the Commonwealth began by stating that the hairs "are known not to exist." (Commonwealth's Response to Motion for DNA Testing, p. 1; TR 87; Box 7 of 8). The Assistant Attorney General also said, "The undersigned attorney, as an officer of this Court, has contacted the crime lab that conducted the original analysis, and has been informed that the hair is not maintained in the laboratory." (Commonwealth's Response to Motion for DNA Testing, p. 7; TR 94; Box 7 of 8). But that statement did not resolve the status of the hairs. At the time the statement was made, the hairs could have still been in the possession of the Commonwealth but stored at a different location or they could have been in storage but misfiled. In 2012, this Court criticized the cursory search and report by counsel, "Present counsel for the Commonwealth has confirmed the lab that conducted the original testing on the hairs cannot locate the hairs but has looked no further. So the Commonwealth only claims that the hairs 'may not be in existence.'" *Wilson v. Commonwealth*, 381 S.W.3d at 192, fn. 51. In February of 2013, when pointedly asked by Judge Bartlett, "Is the hair still in existence or not?" the Assistant Attorney General was still insistent that although she did not know the answer definitively, she believed the hairs were lost or destroyed. (VR 2/13/13, 2:51:35-2:52:05). In a pleading filed on March 22, 2013, the Assistant Attorney General finally admitted that the previous claims regarding the hairs were wrong, but she blamed the Kentucky State Police Forensic Laboratories for misinforming the Attorney General's Office about the matter. (TR IV, 551-553; Box 8 of 8).

and fundamental fairness would be binding on this Court. As a result, the application of the doctrines in accordance with the Commonwealth's argument would mean that this Court must order DNA testing of the hairs.

On page 15 of the Commonwealth's Brief, the Commonwealth makes a different "law of the case" argument. Specifically, the Commonwealth argues that Mr. Wilson's request for testing of the hairs is governed by the "law of the case" doctrine because this Court addressed DNA testing of the hairs in *Wilson v. Commonwealth*, 381 S.W.3d 180 (Ky. 2012). The Kenton Circuit Court had denied DNA testing of the hairs based upon its finding that this Court's ruling in *Wilson v. Commonwealth* regarding the hairs was the "law of the case." (TR V, 600; Box 8 of 8). But at the time that this Court addressed the request for testing of the hairs, this Court, the circuit court and Mr. Wilson were all under the mistaken impression that the hairs were no longer in existence based upon the representations made by the Commonwealth. (*See* footnote 3, *supra*, p. 2). Under those circumstances, it would have quite surprising for the Court to order testing of hairs that did not exist.

On page 17 of its brief, under the heading "The Reasonable Probability Standard," the Commonwealth cites and quotes from *Rivera v. Texas*, 89 S.W.3d 55 (Tex. Crim. App. 2002), and *Kutzner v. State*, 75 S.W.3d 427 (Tex. Crim. App. 2002), for the proposition that Mr. Wilson, like any other defendant, "is entitled to DNA testing only if he establishes, by a preponderance of the evidence, that a reasonable probability exists that exculpatory DNA tests would prove [his] innocence. That showing has not been made if exculpatory tests would merely muddy the waters. [Citations and internal quotation marks omitted]." (Commonwealth's Brief, p. 17). Thus, according to the

Commonwealth, Mr. Wilson must both meet a preponderance of evidence burden and must convince the Court that DNA testing will prove his innocence. What the Commonwealth fails to state is that the quoted language from the Texas decisions comes from the statutes that establish the procedure for Texas prisoners to request DNA testing.

The Texas Code of Criminal Procedure has a system in place to determine whether DNA testing is authorized in a criminal case. According to the Code, the court must first find that the evidence still exists, that it is capable of being tested, and that the evidence has been subjected to a proper chain of custody. Tex. Code Crim. Proc. Art. 64.03(a)(1)(A)(i)-(ii). Next the Code states that identity must have been an issue in the case. Tex. Code Crim. Proc. Art. 64.03(a)(1)(B). Finally, the Code states that the convicted person must establish by a preponderance of the evidence that the person would not have been convicted if exculpatory results would have been obtained through DNA testing and that the DNA test will not result in an unnecessary delay in the administration of justice. Tex. Code Crim. Proc. Art. 64.03(a)(2)(A)-(B).

Kentucky's procedure for post-conviction DNA testing has no requirement of proof by a preponderance of evidence. In fact, with regard to the "reasonable probability" standard, the United States Supreme Court has specifically rejected the application of the "preponderance of evidence" burden: "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Additionally, under KRS 422.285, Kentucky prisoners need not convince the court that DNA test results will "prove their innocence."

On pages 17-18 of the Commonwealth's Brief, the Attorney General says that no

DNA testing is warranted for the semen, blood, and hairs retained in evidence because no witness at trial actually testified that it was "Wilson's hair, blood or semen" that was found in the car. (Commonwealth's Brief, p. 17). The Commonwealth's argument is based upon a basic misunderstanding of the value of forensic DNA testing in criminal cases. As this Court has acknowledged, the power of forensic DNA testing is in its ability to **eliminate** with certainty a specific individual as the source of biological material. *See Butcher v. Commonwealth*, 96 S.W.3d 3 (Ky. 2002), a criminal case involving sexual offenses in which paternity was an issue. This Court explained that DNA paternity testing could exclude a person as the father of a child and produce a probability that a particular person was the father. *Butcher v. Commonwealth*, 96 S.W.3d at 6. In *Moore v. Commonwealth*, 357 S.W.3d 470, 496 n. 17 (Ky. 2011), this Court also recognized that the power of DNA testing was in the ability to exclude a person. *See also Brown v. Commonwealth*, 313 S.W.3d 577 (Ky. 2010). Just like hair comparison analysis or the testing of blood or semen, forensic DNA testing may produce data that points to the **probability** that an individual is the source of blood, semen or hair. But that is as far as it can go. On the other hand, forensic DNA testing can and does provide unassailable results when the result is exclusion of a particular individual.

It is highly significant that hair comparison analysis was employed in Mr. Wilson's case and that a forensic expert testified at trial about the results. A study of 156 cases in which the convicted person was ultimately exonorated found as follows:

> Trial transcripts were obtained for 137 of the 156 exonerees identified as having testimony by forensic analysts called by the prosecution at their trials. This study observed invalid forensic science testimony in the bulk of these trials. In 82 cases, or 60%, forensic analysts called by the prosecution provided invalid testimony. **This invalid**

> **testimony chiefly involved serological analysis and microscopic hair comparison**, but also other forensic techniques, such as bite mark, shoe print, and fingerprint comparisons. Three additional cases involved withholding of exculpatory forensic evidence. Moreover, the invalid testimony was not the product of just a few analysts in a few states, but of 72 forensic analysts employed by 52 laboratories or medical practices in 25 states.

P. Garrett and P. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Virginia Law Review 1, 9 (March 2009)(Emphasis added).

On pages 15-27 of its Brief, the Commonwealth makes discrete and individual arguments as to why DNA testing of the semen, hairs, blood, saliva and fingernails is not warranted. But each of these stored items cannot be considered individually and in isolation to determine if favorable DNA testing results of each item leads the Court to conclude that there is a reasonable probability that "the verdict or sentence would have been more favorable." KRS 422.285(3)(a)(1). As the Commonwealth points out, the "reasonable probability" standard is found in both *Strickland v. Washington*, 466 U.S. 668, 694 (1984)(ineffective assistance of counsel) and in *United States v. Bagley*, 473 U.S. 667, 683 (1985)(exculpatory evidence not disclosed). (Commonwealth's Brief, p. 17). Under *Strickland*, *Bagley* and related cases, the evidence that is the subject of the court's inquiry must be considered as a whole and not piece by piece.

In *Strickland v. Washington*, the Supreme Court said of the prejudice prong of the "reasonable probability" test, that, "the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution." *Strickland v. Washington*, 466 U.S. at 694. In *Strickland*, the Supreme Court also said that "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland v. Washington*, 466 U.S. at 695. In

Kyles v. Whitley, 514 U.S. 419 (1995), the Supreme Court made clear that in analyzing a *Brady* claim, the court may not look at the specific undisclosed items of evidence in isolation. Rather, the Court said, "The fourth and final aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item." (Footnote omitted). *Kyles v. Whitley*, 514 U.S. at 436.

The use of the phrase "reasonable probability" in KRS 422.285 means that where a court is faced with a request for DNA testing of multiple items of biological material in a capital case, the court may not reject DNA testing "item by item" but must consider the untested evidence "collectively." When the stored biological evidence is evaluated collectively, there is no question that favorable DNA results would create a reasonable probability of a more favorable verdict or sentence. In this regard, the Court must assume that DNA testing will show the following:

1) Gregory Wilson is not the source of the semen found on the seat of the car.

2) Gregory Wilson is not the source of the pubic hairs found in the car.

3) Gregory Wilson is not the source of the other hairs found in the car.

4) Gregory Wilson is not the source of the blood found in the car.

5) Gregory Wilson is not the source of the saliva found in the car.

6) Gregory Wilson is not the source of any skin or other biological material found under the victim's fingernails.

7) Brenda Humphrey is the source of the biological material found under the victim's fingernails.

8) The semen is mixed with biological fluid from the victim, demonstrating the likelihood that the source of the semen is the rapist.

9) The victim's boyfriend is not the source of the semen found on the seat of the car.

When the Supreme Court conducted the reasonable probability test in *Kyles v. Whitley*, employing the "collective" approach to the evidence in question, the Court concluded:

> Since all of these possible findings were precluded by the prosecution's failure to disclose the evidence that would have supported them, "fairness" cannot be stretched to the point of calling this a fair trial. Perhaps, confidence that the verdict would have been the same could survive the evidence impeaching even two eyewitnesses if the discoveries of gun and purse were above suspicion. Perhaps those suspicious circumstances would not defeat confidence in the verdict if the eyewitnesses had generally agreed on a description and were free of impeachment. But confidence that the verdict would have been unaffected cannot survive when suppressed evidence would have entitled a jury to find that the eyewitnesses were not consistent in describing the killer, that two out of the four eyewitnesses testifying were unreliable, that the most damning physical evidence was subject to suspicion, that the investigation that produced it was insufficiently probing, and that the principal police witness was insufficiently informed or candid. This is not the "massive" case envisioned by the dissent, *post,* at 1585; it is a significantly weaker case than the one heard by the first jury, which could not even reach a verdict.

Kyles v. Whitley, 514 U.S. at 454. The Commonwealth has argued against DNA testing by citing the description by the Sixth Circuit and by this Court of the "overwhelming" evidence against Mr. Wilson. (Commonwealth's Brief, pp. 18, 19, 26). But in *Kyles v. Whitley*, the Supreme Court granted relief in the face of what was described as a "massive" prosecution case against the defendant.

Once DNA testing is done on the semen, blood, saliva and fingernails, if the results exclude Mr. Wilson, the results can then be compared to the Combined DNA

Index System (CODIS) database, which could result in the identification of a potential perpetrator. See *Johnson v. Commonwealth*, 327 S.W.3d 501, 511 (Ky. 2010)("Kentucky Revised Statutes (KRS) 17.175 provides that the Kentucky State Police shall establish a centralized database of DNA "identification records" including those of convicted offenders and "crime scene specimens" for the purpose of assisting law enforcement with investigating crimes.").

In attempting to downplay the value of DNA testing and to argue that favorable DNA testing results would make no difference, the Commonwealth cites and quotes from an article in "Forensic Science International" from 2002. (Commonwealth's Brief, p. 18). The quoted article has nothing to do with the type of DNA testing (semen, blood, saliva, hairs and fingernails) sought in Mr. Wilson's case. Rather, the article addresses the transfer of "touch" DNA such as the transfer of DNA by handshake or placing a hand on an inert surface. The article has no relevance to Mr. Wilson's case.

The advances in forensic DNA testing mean that very definitive results can be produced on the biological materials that are currently being stored. Furthermore, the age and condition of the samples is no longer an absolute bar to testing using today's technology. In *Moore v. Commonwealth*, 357 S.W.3d 470, 488 (Ky. 2011), this Court recognized that advances in DNA technology have resulted in the ability of today's forensic scientists to test biological materials that in the past were untestable due to degradation or due to the miniscule amount of DNA available in the collected samples. In particular, the Court referred to "more advanced methods, including mitochondrial DNA testing and short tandem repeat (STR) testing" and "Y–STR, which is STR testing of the Y-chromosome." *Moore v. Commonwealth*, 357 S.W.3d at 477, 478.

The advances in DNA technology, the availability of the biological materials for testing, the Attorney General's cavalier attitude toward its statutory obligations to produce an inventory and the serious nature of this case are all factors that support granting the motion for DNA testing. Fundamental fairness requires that the currently available scientific methods of examination be employed in this case.

CONCLUSION

For the foregoing reasons, Mr. Wilson respectfully requests that this Court grant him the relief requested in his original brief.

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